FOR ARGUMENT

No. 95-6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

NORFOLK & WESTERN RAILWAY COMPANY,
Petitioner,

v.

WILLIAM J. HILES,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois Fifth Judicial District

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BRIEF OF THE UNITED TRANSPORTATION UNION AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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December 7, 1995

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

23 pp

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This brief of the United Transportation Union is filed with the consent of the parties, the letters expressing consent having been filed with the Clerk of the Court.

STATEMENT OF INTEREST OF AMICUS CURIAE

The United Transportation Union is a voluntary labor organization representing railroad transportation employees on every major railroad in the United States. On a daily basis railroad workers put their own safety at risk, and rely on the protection of the Federal Employers Li-

ability Act and the Federal Safety Appliance Act. These Acts are vital to the ability of these workers to safely and efficiently perform their duties. The United Transportation Union fully supports the arguments presented on behalf of the plaintiff-respondent, William J. Hiles, and urges this Court to affirm the decision of the Illinois Appellate Court below. Although the decision by this Court is important to Mr. Hiles, it has even greater significance for the thousands of railroad workers in the United States who form the life blood of our railway system.

The language of the Safety Appliance Act, Title 45 U.S.C. Section 2[1] and the key judicial opinions interpreting the Act are discussed later in this brief as well as the briefs filed by the parties to this Appeal. Lost in the debate, however, is any reference to the one, overriding issue that prompted Congress to enact the Safety Appliance Act in 1893. That is, who should bear the risks and the burdens of performing certain jobs that are hazardous, but essential to the operation of a railroad? Congress conclusively answered this question in 1893 by deciding, as a matter of public policy, that the risks and burdens of performing certain hazardous operations should be borne by the railroad industry, not by those unfortunate few individuals who happen to be injured while performing their assigned duties. In 1946, this Court specifically recognized and sanctioned the public policy decision made by Congress in 1893, finding that Congress created the Safety Appliance Act to equitably allocate the inevitable costs of human injury associated with the railroad industry. *Uric v. Thompson*, 337 U.S. 163 (1946).

Nevertheless, the AAR and its member railroads seek to have this Court do for them what they have been unable to persuade Congress to do, that is to effectively repeal Section 2 of the Safety Appliance Act or turn it into a product liability statute. The AAR brief expresses apparent dismay over their claim that its member railroads spend approximately 4% of their gross revenues on "FELA". Nowhere is it claimed that this expenditure is related primarily to coupler cases as opposed to all injury claims. In fact, statistics show a human cost. According to Federal Railroad Administration records, in 1994 there were 31 rail deaths nationwide. Of those, 2 deaths were trainmen (a class of employees overwhelmingly represented by the United Transportation Union) killed while adjusting couplers on railcars which were moving or moved unexpectedly. *Accident/Incident Bulletin No. 163, Calendar Year 1994, U.S. Department of Transportation*, Tables 8, 9, 66 and 67. Petitioner not only seeks judicial approval of the practice, but seeks to eliminate Safety Appliance Act compensation for those injuries and deaths. Petitioner would impose a potential 100% *loss* of "revenues" to those surviving widows and children. Furthermore, suffice it to say that no decision of this Court or any court has premised an interpretation of the Safety Appliance Act on the claimed economic burden of such safety laws upon a defendant. Indeed, if such claims had merit, Congress is the body to which this concern should be addressed.

[1] The Safety Appliance Act (hereinafter SAA) was originally codified at Title 45 U.S.C. Sections 1-16. Section 2 is currently codified at Title 49 U.S.C. Section 20302(a)(1)(A). For purposes of clarity, the citations in this Brief are to the original code sections.

STATEMENT OF THE CASE

Amicus adopts the statement of the case in Respondent's brief.

SUMMARY OF ARGUMENT

A. Section 2 of the Safety Appliance Act requires Couplers Which Perform as Described by the Plain Language of the Act

The Safety Appliance Act requires railroads to use cars which couple automatically upon impact without the necessity of railroad employees going between the ends

of the railroad cars. 45 U.S.C. Section 2. The Act requires *performance* on the occasion in question. Petitioner and the Association of American Railroads contend that an injured employee must prove a defect in order to establish a violation of the Safety Appliance Act and that the "properly set" requirement extends to manual adjustment of couplers and drawbars between the ends of cars. Such an interpretation is *directly contrary* to United States Supreme Court decisions holding that the condition of the equipment is immaterial and further is contrary to the plain language of the Act because railroad employees would be required to go between the ends of railroad cars to realign the couplers in order to effectuate a coupling.

The phrase "without the necessity of men going between the ends of the cars" is descriptive of the equipment and the manner in which that equipment is to perform. The statute requires performance—not flawless components. A mechanically perfect coupler which fails to perform as required violates the Act. The absence of a defect cannot aid the railroad. *Carter v. Atlantic & St. Andrews Bay Ry. Co.*, 338 U.S. 430 (1949).

B. Prior Rulings of This Court Have Been Consistent With the Plain Language of Section 2 of the Safety Appliance Act

The arguments of Petitioner, if adopted, would require this Court to overrule or ignore clear, fundamental rulings in earlier cases arising under Section 2 of the Safety Appliance Act, 45 U.S.C. Section 2. [See *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. 96, 99 (1950); *Carter v. Atlanta & St. Andrews Bay Railway Co.*, 338 U.S. 430 (1949); *O'Donnell v. Elgin, Joliet & E. R. Co.*, 338 U.S. 384 at 390 (1949)]

The first and most important concept is that the plain words of the statute mandate the equipment to *perform* as required.

Second, the *failure to perform* as required by the Act *is the actionable wrong.*

Third, *all issues of negligence* or fault based analysis have been *eliminated.*

Fourth, the *condition of the equipment*, bad or good, the absence of a defect, or the fact that it worked on other occasions, *is immaterial.*

This Court has recognized one defense to the Safety Appliance Act. That is, if the failure to couple is caused by *a knuckle* not being properly opened, the plaintiff's claim for damages will be defeated. *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. 96, 99 (1950). This defense is consistent with the plain words of the Act since the knuckle of the coupler can be opened without the necessity of men going between the ends of the cars. When railroad employees are required to go between railroad cars in order to manually re-align a drawbar, they face an entirely different situation than they do when it is necessary to open a railroad knuckle in order to effectuate a coupling. The pivotal difference between these two activities is the fact that the coupler or knuckle can be opened or "set" *without the need for the employee to go between the ends of the cars*, while realignment of a drawbar requires employees to go between the ends of railroad cars.

C. The Same Policy Considerations That Existed When Section 2 of the Safety Appliance Act Was Drafted Still Exist Today

Congress has determined that certain railroad activities are so hazardous, and so far beyond the control of the individual worker, that any employee who is injured or killed while engaged in one of these activities should be entitled to compensation, regardless of fault. The process of preparing to couple and uncouple cars is one of those activities. The foundation for this public policy decision is basic, fundamental fairness. The Safety Appliance Act,

unlike the FELA, is not a fault-based statute. It is a performance only statute. Proof that a coupling mechanism was or was not defective is immaterial under the Safety Appliance Act. The only question is whether the coupling mechanism performed as required by the Act, that is, without the necessity of individuals going between the end of the cars. Our members, railroad working men and women, who are constantly exposed to the risks of the coupling process are entitled to no less than the fundamental fairness that the Safety Appliance Act provides as evidenced by the plain language of that Act and the clear legislative purpose and intent expressed by Congress.

ARGUMENT

I. THE COURT SHOULD RE-AFFIRM ITS PRIOR DECISIONS WHICH HAVE BEEN CONSISTENT WITH THE PLAIN LANGUAGE OF SECTION 2 OF THE SAFETY APPLIANCE ACT

As early as 1904, this Court held that the phrase "without the necessity of men going between the ends of the cars" applies equally to coupling and uncoupling. *Johnson v. Southern Pacific R.R.*, 196 U.S. 1 (1904). Or, as the Circuit Court of Appeals in *United Transportation Union v. Lewis*, 711 F.2d 233, 244 (D.C. Cir. 1983) stated: "a licit coupler is one which can be coupled and uncoupled without men having to go between the ends of the cars."

This Court ". . . early swept all the issues of negligence out of cases under the Safety Appliance Act. . . A *failure of equipment to perform* as required by the [Safety Appliance Act] is in itself an actionable wrong, *in no way dependent upon negligence* and for the proximate results of which there is liability—a liability that cannot be escaped by proof of care or diligence . . . The statutory liability is not based upon the carrier's negligence." *O'Donnell v. Elgin, Joliet & E. R. Co.*, 338 U.S. 384 at 390 (1949). In *Carter v. Atlanta & St. Andrews Bay Railway Co.*, 338 U.S. 430 (1949) the Court stated:

> This Court has repeatedly attempted to make clear that this is an *absolute duty not based upon negligence*, and that absence of a defect cannot aid the railroad if the coupler was properly set and failed to couple on the occasion in question . . . The fact the coupler functioned properly on other occasions is immaterial.

Id. at 433-434. (Emphasis added).

Furthermore, under the Safety Appliance Act a plaintiff does not have to prove why the couplers failed to couple automatically or that the couplers were defective or in bad condition. This Court, referring to the *O'Donnell* decision, stated in *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. 96, 99 (1950):

> The plaintiff did not have to show a 'bad' condition of the coupler; she was entitled to a peremptory instruction that to equip a car with a coupler which failed to perform properly "in the switching operation was a violation of the Act, which rendered defendant liable for injuries proximately resulting therefrom, and that neither evidence of negligence nor of diligence and care was to be considered on the question of this liability".

Id. at 99, quoting *O'Donnell v. Elgin, Joliet & E. R. Co.*, 338 U.S. 384 at 394 (1949).

Indeed, *in O'Donnell*, this Court rejected the opinion of the lower court that as a result of the broken coupler the "jury may. . . infer that the coupler was defective and was furnished in violation of the Act." *O'Donnell*, 338 U.S. at 386-387. Instead, this Court ordered a peremptory instruction that a coupler which broke in the switching operation was a violation of the Act.

In *O'Donnell*, the defendant railroad also sought to avoid liability by arguing that the coupling failed concurrently with an emergency stop. The Court noted such evidence "might be material on the question of negligence. But the [Safety Appliance Act] certainly requires

equipment *that will withstand the stress and strain of all ordinary operation, grades, loading, stops and starts, including emergency stops.* A defendant cannot escape liability for a coupler's inadequacy by showing too much was demanded of it . . ." *Id.* at 393 (Emphasis added).

The *O'Donnell* Court realized that to permit the railroad any excuses based on the manner or circumstances of the coupling operation is to reintroduce negligence into the case. It would effectively gut the Safety Apliance Act of its "absolute duty". Likewise, in the case before this Court, the Petitioner railroad seeks to excuse its compliance if the car has been on a curve or if employees can attest to its good or non-defective condition. These negligence or fault-based excuses are eliminated by the Act. The *Affolder* decision plainly stated: "Nor do we think that any question regarding the normal efficiency of the couplers is involved in an action under the Safety Appliance Acts". *Id.* at 98. Petitioner suggests that the plain words of the Act be ignored simply because normal non-defective drawbars may go out of alignment during normal operations. Yet the normal efficiency of this equipment *is not* a consideration under the Act.

Certain core concepts emerged from this Court's 1949-1950 trio of Section 2 cases, *Carter, O'Donnell,* and *Affolder*. The statute commands a particular performance of the equipment. Failure to perform as required is the "actionable wrong." All issues of negligence or fault-based analysis are eliminated. The "condition" of the equipment is immaterial. It makes no difference that the coupler worked perfectly before and after the occasion in question; whether it was defective or not or in a bad or good condition.

Petitioner's argument and analysis in this case fails because it rejects these core concepts. It seeks excuses to explain why employees must go between the cars to effect a coupling by arguing that "properly set" should be construed to include manual alignment between the

ends of the cars. However, the term "properly set" was defined by the Court in *Affolder* to mean only that one or both of the knuckles are open—an act which can be accomplished *without the necessity of the employee being between the ends of the cars.* The "properly set" defense does not apply to adjustments between the ends of the cars. This is the only possible conclusion consistent with the plain language of the Safety Appliance Act and the Court's decision in *Affolder*. Indeed, if Petitioner's position were upheld, there would be no reason to equip cars with an operating lever which opens knuckles or uncouples cars from *outside the cars.* The same flawed rationale which claims manual preparation of the drawbar between the cars is not a violation, would apply equally to manual preparation of the knuckle (to couple or uncouple) while between the cars.

It is important to remember that this Court has ruled that Section 2 of the Safety Appliance Act is an absolute liability statute, not a product liability statute. The design and operating characteristics of the coupling mechanism are deliberately left to the railroad industry. As the Congressional record relating to the passage of the Safety Appliance Act clearly states:

> This bill does *not* require any particular kind of coupler to be adopted by the railroads, except a coupler which can be coupled and uncoupled without requiring anybody to go between the cars.

24 Cong. Rec. 1280 (1893) (emphasis added). Section 2 mandates performance characteristics only, *i.e.*, that railcar couplers can be coupled and uncoupled without requiring anyone to go between the cars.

Petitioner's efforts to buttress its argument by its quotations from *Atlantic City R.R. v. Parker*, 242 U.S. 56 (1916) and *San Antonio, etc. R.R. v. Wagner*, 166 S.W. 24, *aff'd*, 241 U.S. 476 (1916) are misplaced. Petitioner draws a conclusion from those cases that a defect or bad condition must be present in order for misalignment to

violate the Safety Appliance Act. Neither case so states. More to the point, in *Parker*, the plaintiff contended that "the failure of a coupler to work at any time sustains a charge of *negligence*". In *Wagner*, the entire Safety Appliance Act analysis is made in the context of *negligence* and *negligence per se*.

The *O'Donnell* court, footnoting the *Wagner* decision as well as several others, stated:

> The arguments and instructions in this case, as well as others, and the language of many opinions and texts reflect widespread confusion as to the effect to be accorded a violation of the federal safety statute. [Footnote to *Wagner*] Part of this confusion is traceable to the diversity of judicial opinion concerning the consequences attributed in negligence actions to the violation of a statute.

O'Donnell, 388 U.S. at 389.

One of the principal themes of the 1949-1950 trio of *O'Donnell*, *Carter* and *Affolder* was to wipe away all forms of negligence or fault based analysis so prevalent and confusing in cases such as *Parker* and *Wagner*.

II. THE FAILURE OF CARS TO COUPLE AUTOMATICALLY UPON IMPACT WITHOUT THE NECESSITY OF INDIVIDUALS TO GO BETWEEN THE CARS IS A VIOLATION OF SECTION 2 OF THE SAFETY APPLIANCE ACT

Until 1991 and the decision in *Reed v. Philadelphia, Bethlehem & N.E.R.R.*, 939 F.2d 128 (3rd Cir. 1991), it had been almost uniformly held that the failure of a coupler to couple automatically upon impact or the need to align a drawbar to make a coupling, which resulted in an injury to an employee was a violation of Section 2.

A. A Misaligned Drawbar, Which Requires Manual Adjustment Between the Cars, Violates Section 2 of the Safety Appliance Act

The early case law as to violations of Section 2 is summarized in *Kansas City S. Ry. v. Cagle*, 229 F.2d 12 (10th Cir. 1955), *cert. denied*, 351 U.S. 908 (1956). In *Cagle*, the drawbar was misaligned before any coupling was attempted. Cagle was injured while attempting to manually align the drawbar. The Court of Appeals stated:

> Appellant states the question in its brief to be, *"Was this one fact that the coupler was out of line a non-compliance with the Act?" We think the answer to this question must be in the affirmative.* A great number of cases have considered the scope and effect of the Coupler Provision of the Federal Safety Appliance Act. Space prevents even a listing of all the cases which have considered these provisions, let alone an analysis thereof. Without exception the cases have held that operating a car on which the drawbar is so far out of line as to prevent automatic coupling violated the Act and imposes absolute liability.

Cagle, 229 F.2d at 14 (Emphasis added).

In *Schaaf v. Chesapeake & Ohio Ry.*, 317 N.W. 2d 679 (Mich. Ct. App. 1982), *cert. denied*, 464 U.S. 848 (1983), a Michigan court in a ruling similar to *Hiles* and other state court decisions stated:

> Defendant fails to cite and our research has not discovered any case holding that drawbars must be properly aligned before a railroad can be found guilty of a violation of the Safety Appliance Act. . . . There is a crucial distinction, however, between a coupler and a drawbar. A coupler can be opened and closed without the necessity of having someone go between any railroad cars. A drawbar, however,

> can only be aligned manually by someone pushing it in while standing between the railroad cars.

Schaaf, 317 N.W.2d at 681.

In *United Transportation Union v. Lewis*, 711 F.2d 233 (D.C. Cir. 1983), this union sought an order prohibiting the use of a "hook procedure" claiming that the procedure, which required the insertion of the employee's arm between the cars, violated the "without the necessity of men going between the ends of the cars" phrase of Section 2. The decision turned on whether the "without the necessity of men going between the ends of the cars" was descriptive of the equipment or whether Section 2 contained an independent prohibition of the act of going between the cars. The court ruled the phrase was descriptive of the equipment and "does not address operating procedures". *Id.* at 245. Certainly, the act of going between the ends of railroad cars could not be prohibited, otherwise railroad movement would come to a grinding halt since there is no other procedure for realigning drawbars.

The court in *Lewis* explained that even though there is no separate prohibition for the act of going between the cars, the railroad is still *liable* pursuant to Section 2 for injuries which result from the non-performing coupler. Liability exists because if the employee must go between the cars to effect a coupling then there "has been a failure to provide equipment that functions as the Statute commands", *Id.* at 251. In a footnote the *Lewis* court emphasized:

> At the same time, however, *actual failure* to couple automatically because of a misaligned drawbar or a closed coupler is sufficient to establish liability under section 2. *See Metcalfe v. Atchison, Topeka & Santa Fe Rwy., supra*, 491 F.2d at 896 and cases cited therein. This is because Congress imposed on railroads a duty not just to *provide* proper equipment, but also to *guarantee its performance*. *See*

> *Affolder v. New York, Chicago & St. Louis R.R.*, 339 U.S. 96, 70 S.Ct. 509, 94 L.Ed. 683 (1950); *Carter v. Atlanta & St. Andrews Bay R.R.*, 338 U.S. 430, 70 S.Ct. 226, 94 L.Ed. 236 (1949); *Delk v. St. Louis & San Francisco Ry.*, 220 U.S. 580, 31 S.Ct. 617, 55 L.Ed. 590 (1911). And FRA continues to adhere to this view of the railroad's responsibility.

Id. at 251, N. 39.

Thus while the Safety Appliance Act does not address or prohibit operating procedures, it requires coupling equipment that is *proper* and *guarantees its performance*. Significantly, the Federal Railroad Administration, the regulator of rail safety, adheres to this view of the railroad's responsibility. In short, the FRA has encouraged operating procedures which reduce injuries[2] and which reduce the need for manual coupling between the cars. But *Lewis* and the FRA adhere to the view that employees are still entitled to compensation for injuries when they occur due to equipment which fails to perform as required by the Act.

Because the drawbar misalignment here required manual adjustment between the cars, the coupling mechanism was in violation of the Act. By 1970, there was substantial national uniformity that a misaligned drawbar was a violation of Section 2 of the Act. At that point, Congress reevaluated the entire scope of all Federal rail safety laws. The result of that reevaluation was the Federal Railroad Safety Act ("FRSA") of 1970, codified at Title 45 U.S.C. Section 421, *et seq*. The committees which studied the legislation discussed the existing safety statutes, including the Safety Appliance Acts, and noted the effectiveness of the protections afforded by the Safety Appliance Acts.

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[2] Indeed, the FRA, in *UTU v. Lewis* permitted the hook procedure precisely because it increased the likelihood of automatic coupling and decreased the need for employees to go between the cars to manually adjust the drawbars; the precise activity being performed by Respondent Hiles at the time of his injury.

Report of the Committee On Interstate And Foreign Commerce on S. 1933 To Provide for Federal Railroad Safety, Hazardous Materials Control and For Other Purposes, June 16, 1970, House Report No. 91-1194. The Secretary of Transportation proposed repeal of these earlier Federal rail statutes such as the Safety Appliance Acts and proposed that the Department of Transportation continue the protection solely by regulation under this legislation. (i.e. see current FRA regulations contained in 49 C.F.R.) [1970 Cong. Rec. 4109 (1970)]. In fact, there are FRA regulations which relate to couplers, their components, as well as many aspects of railroad operations.

Nevertheless, it was the decision of Congress to retain the Safety Appliance Acts. The Congressional Record states: "These particular laws have served well. In fact, the committee chose to continue them *without change*." *Report of the Committee On Interstate And Foreign Commerce on S. 1933 To Provide for Federal Railroad Safety, Hazardous Materials Control and For Other Purposes*, June 16, 1970, House Report No. 91-1194, page 8 (emphasis added).

B. The Presence or Absence of a "Defect" Is Immaterial Under Section 2 of the Safety Appliance Act

Clearly, Congress intended the continued strict enforcement of the simple, direct words of Section 2. If the equipment fails to perform as required by the Act and an employee is injured, the railroad is liable. The flawed decisions of the lower courts in cases such as *Reed v. Philadelphia, Bethlehem & N.E.R.R.*, 939 F.2d 128 (3rd Cir. 1991), *Goedel v. Norfolk & W. R.R.*, 13 F.3d 807 (4th Cir. 1994), *Kavorkian v. CSX Transportation, Inc.*, 33 F.3d 570 (6th Cir. 1994), and *Lisek v. Norfolk & W. Rwy.*, 30 F.3d 823 (7th Cir. 1994) can be traced largely to a failure to follow the core principles of Section 2. The above cases emphasize the condition of the equipment (i.e. defects) rather than the performance of the

equipment. In each of those cases the existence of a bad or defective condition is either required or somehow incorporated as a defense. Amazingly, Petitioner, in its Brief (at pp. 24-25) rejects one of the central rationales of the *Lisek* decision: that a failed coupling must first occur. Further, these decisions permit manual adjustment between the cars either because Section 2 does not "address operating procedures" (see *United Transportation Union v. Lewis*) or because the Act was meant to protect against moving railcars only.

A review of the Congressional Record prior to the passage of the Safety Appliance Act reveals broad themes only. However, it is clear that Congress did not mandate a specific type or design of coupler—only how it must perform. Nowhere does the Record suggest that the presence or absence of defects in the coupling mechanism was a consideration or component of the Act. Once again, the performance of the equipment, not its condition, is the exclusive focus of the plain words of the Act.

The short answer to the "moving" equipment argument is that the Act makes no such distinction nor is such a distinction drawn in any early cases under the Act. The practical answer is that it makes no difference to railroad employees whether they sustain an injury while moving the drawbar or because the railcar moves while the employee is between the ends of the cars to manually adjust the drawbars. Indeed, the plain language of the Act make no distinction between moving and stationary railcars. Petitioner's arguments would, in essence, rewrite those 100 year old words to say that it must be coupled or uncoupled "without the necessity of men going between the ends of *moving* cars".

UTU agrees here that Section 2 does not prohibit entering between cars by employees. Section 2 describes the type of equipment required and how it must perform. If manual adjustment between the cars is required, the coupler has failed to comply with Section 2. In short, the

equipment violates Section 2—not the employee who makes the adjustment.

III. SECTION 2 OF THE SAFETY APPLIANCE ACT IS VITAL TO THE RAILROAD EMPLOYEE'S ABILITY TO SAFELY PERFORM HIS OR HER DUTIES

The significant question to be asked at this time is why the Court is being asked to "rewrite" an Act of Congress that has successfully reduced injuries and protected the rights of railroad workers for over a century. The United Transportation Union, as amicus curiae, respectfully submits that no changes in technology, railroad operating procedures, or public policy have occurred at any time during the last century which would justify the change in the law that has been proposed by the Petitioner in this appeal. Hazardous job duties still must be done by individual railroad workers.

The size, weight and overall complexity of railcars and trains has increased over the years. Even a slight error in the movement of the equipment, or any failure of the equipment to perform, can cause devastating injuries or death. Every time a railroad employee is required to go between two railroad cars to manually realign a drawbar in order to effectuate a coupling, that employee is at risk of injury or death. This is true regardless of whether the cars are "stationary" at the precise moment the employee goes between them, because said cars are subject to movement at any time by simultaneous railroad operations being undertaken by other railroad employees. There is no way in which it can be guaranteed that railroad cars which are stationary when an employee goes between them to align a drawbar will remain that way for the duration of the time in which the employee must be between the cars to complete the task.

One of the problems of relating drawbar adjustments to Congressional remarks in 1893 is this simple question: Did drawbars "misalign" in 1893 and if so, was it sufficient to prevent automatic coupling without the necessity of men to go between the ends of the car. This question is not a fanciful one. The length and movement of a drawbar is directly related to the size of the railcar, the turning radius of curves, and to some degree the type of drawbar (i.e. cushioning devices that permit it to move in and out). The simple fact is that as railroads built *bigger* (and more profitable) railcars and equipped them with cushioning devices (to prevent *damage* to the goods being transported by those cars) the movement of drawbars from side to side increased and, therefore, the incidence of drawbars being "off center" or misaligned increased. Despite these developments, railroads (see AAR Brief) claim that they are unable to develop "satisfactory" technology for self-centering devices that can be activated without going between the cars. The AAR does not explain what it means by "satisfactory". Perhaps it is too expensive or it is easier to pay injured employees than develop satisfactory technology. Of course, if this Court agrees with Petitioner, no claims payment need be made and the current manually adjusted drawbar will likely be elevated to the level of a "satisfactory" technology.

The Legislative wisdom of Section 2 is that it is as flexible as technology. Railroads have the freedom to develop any form of coupling apparatus as long as it performs as required by the Act. In this Court, the Petitioner and AAR simply state that they cannot or will not develop a coupler or drawbar which can be adjusted *without* individuals going between the cars.

Thus, this Court is asked to interpret Section 2 contrary to its plain language and contrary to prior rulings of this Court, and deny injured railroad workers compensation for injuries resulting from such non-conforming devices. The request is made to this Court by Petitioner despite a refusal by Congress to repeal or change Section 2 in 1970. Petitioner's position should be clearly rejected. The health and welfare of our members and their families would be seriously undermined by any other result.

CONCLUSION

On the basis of the foregoing, *amicus curiae* respectfully submits that the judgment of the Appellate Court of Illinois in this case be affirmed.

Respectfully submitted,

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